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IN THE

Supreme Court of the United States

SAMSON TAIWO DADA,

Petitioner,

v.

PETER D. KEISLER,
ACTING ATTORNEY GENERAL,

Respondent.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

BRIEF FOR PETITIONER

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QUESTION PRESENTED

Whether the filing of a motion to reopen removal proceedings automatically tolls the period within which an alien must depart the United States under an order granting voluntary departure.

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BRIEF FOR PETITIONER

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1) is unreported, but is available at 2006 WL 3420124. The decision of the Board of Immigration Appeals denying Petitioner's Motion to Reopen and Reconsider (*id.* 3-4), the decision of the Board affirming the immigration judge's decision (*id.* 5-6), and the decision of the immigration judge (*id.* 7-9) are also unreported.

JURISDICTION

This Court has jurisdiction under 28 U.S.C. § 1254(1). The judgment of the court of appeals was entered on November 28, 2006. The petition for a writ of certiorari was filed on February 26, 2007 and granted on September 25, 2007.

STATUTES AND REGULATIONS INVOLVED

The following statutory and regulatory provisions are set forth in relevant part in the petition:

a. 8 U.S.C. § 1229a(c)(7) (Pet. 2);

b. 8 U.S.C. § 1229c(b) (Pet. 3);

c. 8 C.F.R. § 1003.2(d) (Pet. 5).

INTRODUCTION AND STATEMENT OF THE CASE

As part of its amendments to the Immigration and Nationality Act (INA) in 1996, Congress codified an alien's right to file a motion to reopen removal proceedings. 8 U.S.C. § 1229a(c)(7). Congress in 1996 also established new eligibility criteria and time periods for "voluntary departure," which is a form of discretionary relief that allows a favored class of aliens "voluntarily to depart the United States" as an alternative to removal. *Id.* § 1229c(a)(1), (b)(1).

This case raises an important question about the intersection of these two provisions, namely, whether the timely filing of a motion to reopen under 8 U.S.C. § 1229a(c)(7) tolls the period of voluntary departure under 8 U.S.C. § 1229c. Without tolling, aliens granted voluntary departure are effectively denied their statutory right to seek reopening. The alien must remain in the country and hope that the immigration official resolves his motion in time. If he leaves, his motion is deemed withdrawn. If he stays and the motion is unresolved, as is so often the case, he faces penalties including ineligibility for reopening.

A. The Statutes And Regulations Governing Motions To Reopen And Voluntary Departure

1. Motions To Reopen

For more than 90 years, motions to reopen have been a part of deportation proceedings. 23 Fed. Reg. 9,115, 9,118-9,119 (Nov. 26, 1958) (promulgating 8

C.F.R. §§ 3.2, 3.8 (motions to reopen and for reconsideration)); *see also, e.g.*, *Chew Hoy Quong* v. *White*, 244 F. 749, 750 (9th Cir. 1917); *Ex parte Chan Shee*, 236 F. 579, 580 (N.D. Cal. 1916). In 1996, as part of the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA), Congress first codified an alien's right to a motion to reopen. Pub. L. No. 104-208, div. C, § 304(a)(3), 110 Stat. 3009-546, 3009-593 (1996) (codified at 8 U.S.C. § 1229a(c)(7)).

Before enacting this provision, Congress considered the issue for a number of years. As of 1990, the regulations governing motions to reopen did not have any time limits or limits on the number of motions an alien could file. *See* 8 C.F.R. § 3.2 (1989). In 1990, Congress instructed the Attorney General to conduct a study on perceived abuses associated with aliens' failure to consolidate their requests for relief and to issue regulations specifying the maximum time period for filing motions to reopen. *See* Immigration Act of 1990, Pub. L. No. 101-649, § 545(c), (d), 104 Stat. 4978, 5065-5066.[1]

The Attorney General's report found "no pattern of abuse" with respect to aliens failing to consolidate their requests, noting that the total number of motions to reopen was "relatively low" and the majority of requests for relief were appropriately "based upon an allegation of new facts," as required by the regulations then in place. *Attorney General's Report to Congress on Con-*

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[1] Around the same time, this Court expressed similar concerns. *See, e.g.*, *INS* v. *Doherty*, 502 U.S. 314, 322-323 (1992) (involving pre-1990 motion to reopen) (noting that "[t]here is no statutory provision for reopening of a deportation proceeding" and expressing concerns about possible abuse); *INS* v. *Rios-Pineda*, 471 U.S. 444, 446, 450 (1985).

solidation of Requests for Relief from Deportation 6-7 (1991); *see also* 68 Interpreter Releases 907, 908 (July 22, 1991).

With respect to setting time periods for motions to reopen, Congress directed that, "[u]nless the Attorney General finds reasonable evidence to the contrary, the regulations should state that such motions be made within 20 days of the date of the final determination in the proceeding and that such motions be limited to one motion to reopen and one motion to reconsider." H.R. Conf. Rep. No. 101-955, at 133 (1990), *as reprinted in* 1990 U.S.C.C.A.N. 6784, 6798. The Department of Justice initially proposed a 20-day time period for motions to reopen, *see* 59 Fed. Reg. 29,386, 29,388 (June 7, 1994), but ultimately decided on a final regulation with a 90-day time period, *see* 61 Fed. Reg. 18,900, 18,905 (Apr. 29, 1996); *see also id.* 18,902. The Department explained that the limitation of one motion to reopen per alien combined with the larger 90-day period struck the proper balance, for it "reflect[ed] the congressional intent to streamline the deportation process, while providing a reasonable opportunity for meritorious cases to be heard." 60 Fed. Reg. 24,573, 24,574 (May 9, 1995).

When codifying motions to reopen, Congress adopted the 90-day time period. IIRIRA, § 304(a)(3), 110 Stat. at 3009-593 (codified at 8 U.S.C. § 1229a(c)(7)(C)(i)). An alien is now entitled by statute to file one motion to reopen. 8 U.S.C. § 1229a(c)(7).[2]

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[2] Similarly, in 1996, Congress also codified an alien's right to file one motion to reconsider a decision that the alien is removable. IIRIRA, § 304(a)(3), 110 Stat. at 3009-593 (codified at 8 U.S.C. § 1229a(c)(6)(A)). That right too had previously existed by regulation. *See* 23 Fed. Reg. at 9,118; 8 C.F.R. § 3.2 (1994) (motions to reopen and for reconsideration).

The motion to reopen must state new facts that the alien seeks to establish at a hearing and must be supported by evidentiary material. *Id.* § 1229a(c)(7)(B); *see also* 8 C.F.R. § 1003.2(c)(1). Approximately 10,000 motions to reopen are filed with the Board of Immigration Appeals (BIA) each year. DOJ Executive Office for Immigration Review, *FY 2006 Statistical Year Book* T2 (2007), *available at* http://www.usdoj.gov/eoir/statspub/fy06syb.pdf (9,256 such motions filed in fiscal year 2006). Consistent with "long-standing" practice, a motion to reopen is generally assigned to the member(s) of the Board who decided the original appeal. 67 Fed. Reg. 54,878, 54,887 (Aug. 26, 2002); *see also* 8 C.F.R. § 1003.1(e)(5). "This permits some familiarity with the record and obviates the use of such a motion to merely seek a second panel review of a decision." 67 Fed. Reg. at 54,887.

2. Voluntary Departure

Voluntary departure is a form of discretionary relief available to a favored class of aliens. It permits an alien who has satisfied a number of criteria to leave voluntarily, thereby granting certain benefits to the alien (such as the ability to put his affairs in order) and saving the Government the resources and expenses associated with effectuating a forcible removal.

All categories of aliens facing removal, including lawful permanent residents, are eligible to seek voluntary departure, but certain statutory and non-statutory criteria must be met. For example, an alien who has been convicted of an aggravated felony is barred from receiving voluntary departure. *See* 8 U.S.C. § 1229c(a)(1), (b)(1)(C). Aliens being deported on terrorism grounds are also ineligible for voluntary departure. *See id.*

Under the statutory scheme put in place in 1996, the eligibility criteria depend on whether an alien seeks voluntary departure (1) in lieu of or before the conclusion of removal proceedings, 8 U.S.C. § 1229c(a), or (2) at the conclusion of removal proceedings, *id.* § 1229c(b).[3] These two categories differ in the availability of appeals, the requirements that must be satisfied, and the number of days available for voluntary departure.

Only aliens seeking voluntary departure during or before the completion of proceedings need to waive their appeals. This is required not by statute but by regulation; such aliens must concede removability, make no additional requests for relief, and waive appeal of all issues. *See* 62 Fed. Reg. 10,312, 10,372 (Mar. 6, 1997); 8 C.F.R. § 1240.26(b)(1)(i)(B)-(D).

Aliens seeking voluntary departure at the conclusion of proceedings are not required by statute or regulation to waive appeals; for such aliens the receipt of a grant of voluntary departure is not conditioned on the waiver of a right to administrative and judicial review. Thus, an alien seeking relief from an immigration judge, such as asylum or adjustment of status,[4] but who

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[3] Before IIRIRA, the voluntary departure statutory provisions did not differentiate between requests before and after the completion of removal proceedings. *See* 8 U.S.C. §§ 1252(b), 1252(g), 1252b(e)(2), 1254(e) (1994).

[4] Aliens may seek various forms of relief from the immigration judge. For aliens who are not lawful permanent residents, such relief includes: asylum, 8 U.S.C. § 1158; withholding of removal, *id.* § 1231(b)(3); cancellation of removal, *id.* § 1229b(b); adjustment of status, *id.* § 1255; or temporary protected status, *id.* § 1254a. For legal permanent residents facing removal, possible grounds for relief include: cancellation of removal, *id.* § 1229b(a); waiver of deportation, 8 U.S.C. § 1182(c) (1994) (repealed 1996), *see INS* v. *St. Cyr*, 533 U.S. 289, 294-297 (2001); a record of lawful ad-

is denied that relief is not required to waive future appeals in exchange for voluntary departure. The alien can accept voluntary departure at the conclusion of proceedings and continue to press his administrative and judicial appeals on the underlying relief.

These aliens, though they retain rights to appeal, both must meet requirements not applicable to the aliens seeking voluntary departure in lieu of or before the completion of proceedings, and face shorter voluntary departure periods. Specifically, an alien seeking voluntary departure after proceedings must prove, *inter alia*, that he is and has been of "good moral character" for the previous five years. 8 U.S.C. § 1229c(b)(1)(B). Aliens seeking voluntary departure after the conclusion of proceedings may receive a period of voluntary departure up to 60 days, while those seeking voluntary departure in lieu of or before the conclusion of proceedings have up to 120 days. *Id.* § 1229c(a)(2)(A), (b)(2).

For both categories of voluntary departure recipients, an overstay of the voluntary departure period gives rise to two penalties: a mandatory civil fine of between $1,000 and $5,000, 8 U.S.C. § 1229c(d)(1)(A), and ineligibility for a period of ten years from obtaining another grant of voluntary departure, cancellation of removal, adjustment of status, change of nonimmigrant classification, or a record of lawful admission, *id.* § 1229c(d)(1)(B). The statute mandates that an order permitting voluntary departure "shall inform the alien of the penalties" of overstaying the applicable departure period. *Id.* § 1229c(d)(3).

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mission, 8 U.S.C. § 1259; waiver of inadmissibility, *id.* § 1182(h), (i); or waiver of inadmissibility, *id.* § 1227(a)(1)(H).

3. The Intersection Of The Statutes And Regulations

This case concerns the intersection of these provisions governing motions to reopen and voluntary departure. Specifically, the question is whether the voluntary departure period is tolled pending a motion to reopen. This question has important ramifications because it affects the availability of motions to reopen for this favored class of aliens.

If the voluntary departure period is tolled, the alien can file a motion to reopen and await a ruling. If the voluntary departure period is not tolled, however, the alien is effectively denied a decision on a motion to reopen. The alien cannot leave while he awaits a decision on the motion, because if he departs then his motion to reopen will be deemed withdrawn. 8 C.F.R. § 1003.2(d). He also cannot forgo voluntary departure by accepting a deportation order (as Petitioner unsuccessfully attempted to do in this case). Pet. App. 3-4. His only option is to remain and hope that the immigration official resolves his motion before the expiration of the voluntary departure period. But if the official does not resolve it within this timeframe, as occurs regularly, the alien will not only likely be ineligible for reopening, but will also face other penalties. *See* 8 U.S.C. § 1229c(d)(1).

After the passage of IIRIRA, the Department of Justice acknowledged the questions arising from the interaction of these provisions and suggested three possible constructions of the statute. Two of these proposals would have permitted some form of tolling. 62 Fed. Reg. at 10,325-10,326 (suggesting the possibility that the motion tolls any period during which the motion is pending, or the voluntary departure period runs for a fixed period of time following disposition of any

such motion). The Department did not issue regulations that address the tolling question.

Seven courts of appeals have since considered the tolling question. Four circuits have adopted a tolling rule, and three have rejected it. *Compare Ugokwe* v. *U.S. Attorney General*, 453 F.3d 1325 (11th Cir. 2006); *Kanivets* v. *Gonzales*, 424 F.3d 330 (3d Cir. 2005); *Sidikhouya* v. *Gonzales*, 407 F.3d 950 (8th Cir. 2005); *Azarte* v. *Ashcroft*, 394 F.3d 1278 (9th Cir. 2005) *with Chedad* v. *Gonzales*, 497 F.3d 57 (1st Cir. 2007); *Dekoladenu* v. *Gonzales*, 459 F.3d 500 (4th Cir. 2006), *petition for cert. filed* (U.S. Mar. 22, 2007) (No. 06-1285); *Banda-Ortiz* v. *Gonzales*, 445 F.3d 387 (5th Cir. 2006), *cert. denied*, 127 S. Ct. 1874 (2007). In the three cases that held that tolling does not apply, there were two dissenting opinions, *Chedad*, 497 F.3d at 66 (Lipez, J., dissenting); *Banda-Ortiz*, 445 F.3d at 391 (Smith, J., dissenting), and one concurring opinion that would have narrowed the majority's decision, *Dekoladenu*, 459 F.3d at 508 (Gregory, J., concurring).

B. Factual Background

Petitioner Samson Taiwo Dada is a native and citizen of Nigeria. Pet. App. 1, 7. In 1998, he entered the United States legally on a nonimmigrant visa, which he overstayed. *Id.* 7. He subsequently married an American citizen, who filed a Petition for Alien Relative, Form I-130, on Dada's behalf, seeking to adjust his immigration status. *Id.* 8. Because former counsel had neglected to provide all of the documentary evidence requested by the Bureau of Citizenship and Immigration Services, however, the I-130 petition was denied. *Id.*

In 2004, the Government initiated removal proceedings against Dada, charging him with having remained in the United States for a time longer than permitted, in violation of Section 237(a)(1)(B) of the INA. Pet. App. 7-

8. At his removal proceeding, Dada, through counsel, requested a continuance so that a newly filed I-130 could be adjudicated, and he sought voluntary departure in the alternative. *Id.* 7-9. The presiding immigration judge denied Dada's continuance request because she could not "justify to [her] boss" keeping the case on her docket while the I-130 petition was processed. C.A. App. 164; *see also* Pet. App. 8. The judge exercised her discretion to grant Dada voluntary departure, and granted a 60-day voluntary departure period. Pet. App. 9; *see also* C.A. App. 166. The immigration judge asked whether Petitioner "reserve[d] appeal," and Petitioner's counsel confirmed that he did. C.A. App. 167 ("Q. And you reserve appeal? A. Yes, Your Honor.").

In November 2005, the BIA affirmed the immigration judge's decision without opinion in a per curiam order and reinstated the voluntary departure period for 30 days. Pet. App. 5-6.

Before the expiration of this 30-day period, and within the time allowed to file, Dada filed in the BIA a motion to reopen and to reconsider his removal proceedings. *See* Pet. App. 3. At the time Dada filed his motion, the courts of appeals to have considered the question had unanimously concluded that a timely-filed motion to reopen tolls the period of voluntary departure. *See Kanivets*, 424 F.3d 330; *Sidikhouya*, 407 F.3d 950; *Azarte*, 394 F.3d 1278.

In addition, Dada sought to withdraw his request for voluntary departure and accept an order of deportation (*i.e.*, to waive the benefits of voluntary departure). Pet. App. 3. He also asked the BIA to stay his removal pending resolution of his motion to reopen. *Id.*

Approximately two months later, the BIA denied Dada's motion in a non-precedential one-member per curiam order. Pet. App. 3-4. Without acknowledging

the tolling question or addressing the merits of Dada's arguments, the BIA rejected the motion on the ground that Dada's overstay of the voluntary departure period rendered him ineligible by statute for adjustment of status. *Id.* The Board did not address Dada's request to withdraw the grant of voluntary departure. *Id.*

Dada petitioned for review in the Fifth Circuit. While his petition was pending, that court, in a divided opinion, decided *Banda-Ortiz*, 445 F.3d 387, breaking with its sister circuits and holding that a timely-filed motion to reopen does not toll a period of voluntary departure. In light of *Banda-Ortiz*, the Fifth Circuit denied Dada's petition. Pet. App. 1-2.

SUMMARY OF ARGUMENT

Basic principles of statutory interpretation require the conclusion that a timely-filed motion to reopen under 8 U.S.C. § 1229a(c)(7) tolls a voluntary departure period granted under 8 U.S.C. § 1229c. This Court's precedents instruct that the statute must be read as a whole and construed so as not to eliminate an important statutory right for a class of aliens. This is especially so where, as here, the Government's construction would create a Hobson's choice for aliens and lead to arbitrary results.

Tolling is also consistent with the structure of the 1996 amendments and traditional tolling principles. In particular, the amendments did not require the waiver of administrative and judicial appeals as a condition of voluntary departure. In addition, absent tolling, the newly-codified right to seek reopening would be available to criminal aliens, but not to the favored subset of aliens eligible for voluntary departure. Finally, in a related context, this Court has tolled statutory deadlines pending consideration of a motion to reopen and should do the same here. *See* Part I *infra*.

The constitutional avoidance canon provides an additional reason to reject a no-tolling rule. In the absence of tolling, the ability to pursue a motion to reopen will depend entirely on arbitrary government action unrelated to the alien and out of his control. A subset of voluntary departure recipients will have their motions to reopen decided on their merits, while many will not, the result dependent entirely on how quickly a given immigration official acts on the motion. The result is a system in which arbitrary government action jeopardizes aliens' protected interests under the Due Process Clause and treats identically situated classes of aliens differently absent any rationale. Such a regime raises grave concerns under the Fifth Amendment. Given the availability of a plausible, even preferable, construction, the constitutional avoidance canon strongly militates toward tolling. *See* Part II *infra*.

Finally, at a minimum, the Court should permit tolling in this case. *See* Part III *infra*.

ARGUMENT

I. Under Basic Statutory Interpretation Principles And This Court's Precedents, A Timely Motion To Reopen Tolls The Voluntary Departure Period

A. This Court's Precedents Support A Construction That Preserves A Voluntary Departure Recipient's Right To A Motion To Reopen

Basic principles of statutory construction instruct that the provisions governing voluntary departure and motions to reopen must be read in harmony with each other and in light of the statute as a whole. Congress codified the right to file a motion to reopen for the benefit of all aliens, including the favored subset granted voluntary departure. Congress also provided that permission to depart voluntarily is valid for a

specified time period. In considering the interaction of the reopening provision with the voluntary departure provision, this Court cannot read one provision in isolation from the other.

Absent tolling, these two provisions create a trap for a voluntary departure recipient facing changed circumstances who files a motion to reopen. If he leaves the country in an attempt to comply with the voluntary departure order, his motion to reopen will be deemed withdrawn. If, on the other hand, he waits for the adjudication of his motion, he risks being penalized for overstaying the voluntary departure period, and will be in a worse situation than if he had never sought voluntary departure at all.

This Court's precedents demonstrate that the statute should be construed to preserve this important right to seek reopening for the class of aliens who are granted voluntary departure. This is all the more clear because voluntary departure recipients constitute a favored class of aliens, who, in many cases, must establish "good moral character." Additionally, this Court's precedents demonstrate that the statute should be construed to avoid the Hobson's choice and arbitrary results that would follow from the Government's construction.

1. Reading the statute as a whole requires tolling here

In interpreting statutory provisions, this Court "follow[s] the cardinal rule that a statute is to be read as a whole." *King* v. *St. Vincent's Hosp.*, 502 U.S. 215, 221 (1991) (explaining that "the meaning of statutory language, plain or not, depends on context"); *see also Shell Oil Co.* v. *Iowa Dep't of Revenue*, 488 U.S. 19, 25 (1988) (noting that language should not be read "without reference to the statutory context"); *United States* v. *Morton*,

467 U.S. 822, 828 (1984) (this Court "read[s] statutes as a whole"); *United States* v. *Witkovich*, 353 U.S. 194, 199 (1957) (declining to read immigration provision "in isolation and literally" and instead looking to the "Act as a whole"). In doing so, the Court has sought to "harmonize" the various provisions of a statute. *See Witkovich*, 353 U.S. at 200; *see also Digital Equip. Corp.* v. *Desktop Direct, Inc.*, 511 U.S. 863, 879 (1994) (recognizing the "familiar principle of statutory construction that, when possible, courts should construe statutes ... to foster harmony with other statutory and constitutional law"). Without tolling, the voluntary departure provision would effectively nullify the statutory right to a motion to reopen for voluntary departure recipients.

In *Costello* v. *INS*, 376 U.S. 120 (1964), this Court considered a statutory interpretation question quite similar to the one presented here, also involving the interaction of immigration provisions. Reading the statute as a whole, the Court refused to adopt a construction that would have nullified an avenue of relief for an entire class of aliens.

Costello involved a statutory provision, Section 241(a)(4) of the INA, which permitted the deportation of "[a]ny alien ... who ... at any time after entry is convicted of two crimes involving moral turpitude." 376 U.S. at 121 (internal quotation marks omitted). The petitioner, who had previously become a naturalized citizen, was convicted of two separate offenses of tax evasion and subsequently denaturalized. *See id.* The question was whether the crimes committed while he was naturalized counted for purposes of the provision. *Id.*

First, the Court interpreted the deportation provision at issue. Two Justices and the court of appeals believed the plain language of the statute to be unambiguous, as Costello was an alien who committed the

crimes "at any time after entry." 376 U.S. at 133 (White, J., dissenting) ("Th[e] description of the deportable alien [in the statutory provision] fits Costello exactly and unambiguously."); *see also id.* at 122 (quoting court of appeals). The Court, however, disagreed that the provision was unambiguous. *Id.* at 124-125.

The Court emphasized that the Government's interpretation would result in Costello's being deported without the opportunity to apply for relief under another provision, which granted aliens the right to apply for a judicial recommendation against deportation at the time of conviction. 376 U.S. at 126-127. The Court stated that this second provision, which authorized nothing more than the opportunity to apply for discretionary relief, was "an important part of the legislative scheme." *Id.* at 127 (internal quotation marks omitted). Under the Government's reading, the discretionary relief provision would "become a dead letter" for certain aliens. *Id.* The Court found "no evidence whatever" that this intersection "was even considered" by Congress. *Id.* at 132. The Court concluded: "We would hesitate long before adopting a construction [that] would, with respect to an entire class of aliens, completely nullify a procedure so intrinsic a part of the legislative scheme." *Id.* at 127-128.

Second, the Court considered an alternative argument put forth by the Government—namely that, based on a third statutory provision, denaturalization should "relate back" to the date of the original naturalization order. 376 U.S. at 128-129. While the plain language of the relation-back provision arguably answered the question, *see id.* at 139-140 (White, J., dissenting), as it stated that denaturalization "shall be effective as of the original date of the [naturalization] order," *id.* at 129 n.14, the Court did not focus on this language in isolation. Rather, the Court looked to whether there was

any indication that Congress intended the relation-back provision to apply to the deportation provision at issue, and found no such indication. *Id.* at 129.

The Government's construction, the Court noted, "would put [the alien] in a much more disadvantageous position than he would have occupied if he had never acquired a naturalization certificate at all." 376 U.S. at 131. Moreover, there was "not a single indication in the copious legislative history" to suggest that Congress intended the specific relation-back provision "to apply to the general deportation provisions of the Act." *Id.* at 129. The Court concluded that, if Congress had wanted such a result, "and thus to render nugatory and meaningless for an entire class of aliens the protections of [the discretionary relief provision], Congress could easily have said so." *Id.* at 132; *see also id.* ("[T]here is no evidence whatever that the question was even considered.").[5]

This case presents a closely analogous issue. As in *Costello*, the Government's reading would, "with respect to an entire class of aliens, completely nullify a procedure so intrinsic a part of the legislative scheme." 376 U.S. at 127-128; *see also id.* at 132 (rejecting construction that would "render nugatory and meaningless for an entire class of aliens" the discretionary relief at issue). Motions to reopen are at least as important a

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[5] The Court adopted this construction notwithstanding the fact that Costello had obtained citizenship through "willful misrepresentation." 376 U.S. at 121, 130-131. As a result, Costello was likely better off because he had committed fraud because, under the Court's construction, the crimes Costello committed while a citizen (even though his citizenship was fraudulently obtained) did not count for purposes of the deportation provision. *See* 376 U.S. at 130-131; *id.* at 135 (White, J., dissenting).

part of the legislative scheme as the discretionary relief at issue in *Costello*: Motions to reopen have been a part of deportation proceedings for over 90 years, and, indeed, Congress expressly codified the right in 1996. Moreover, the "class of aliens" being deprived of relief in *Costello* was, by definition, a class that had committed crimes. *Id.* at 121, 126-127. Here, the aliens being deprived of relief are a favored subset who have *not* committed certain crimes and who, in many instances, must establish "good moral character" in order to be eligible for relief. 8 U.S.C. § 1229c(a)(1), (b)(1)(B)-(C); *see also* Part I.C *infra*.

There are four additional similarities. *First*, as in *Costello*, 376 U.S. at 124-125, 129, the plain language of the statutory provisions does not resolve the question at issue,[6] and the ambiguity is particularly apparent

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[6] Although Congress set forth the length of the voluntary departure period, it did not choose the same language and structure of usual statutory time limits. Ordinarily, time limits state an affirmative obligation, directing an event to occur within a certain time limit. Indeed, this is the case with the timing of motions to reopen themselves, as well as other time limits in the INA affecting official action. *See* 8 U.S.C. § 1229a(c)(7)(C)(i) ("the motion to reopen shall be filed within 90 days of the date of entry of a final administrative order of removal"); *id.* § 1229a(c)(6)(B) ("The motion [to reconsider] must be filed within 30 days of the date of entry of a final administrative order of removal."); *id.* § 1226a(a)(5) ("The Attorney General shall place an alien detained under paragraph (1) in removal proceedings, or shall charge the alien with a criminal offense, not later than 7 days after the commencement of such detention."). The provisions at issue here, however, do not state any affirmative obligation. Instead of directing the alien's actions, they passively describe a "period" during which "permission to depart" remains "valid." *Id.* § 1229c(a)(2)(A), (b)(2) ("[P]ermission to depart voluntarily under this subsection shall not be valid for a period exceeding [120 or 60] days."). Given that Congress imposed such express time limits on multiple other occasions

when the interaction of the relevant provisions is considered.[7] Indeed, the agency itself has acknowledged that the plain language does not resolve whether tolling applies. In a 1997 interim rule, the Department of Justice noted the question presented by the interaction of the two provisions, and proposed three possible ways to address the issue, two of which involved some form of tolling. 62 Fed. Reg. at 10,325-10,326.

Similarly, the agency has recognized that the statutory language permits tolling in the related context of

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in the INA itself, this language is open to a less strict construction. Moreover, the question in this case does not fit comfortably within a plain language analysis; even if one considered the language to be clear, it would not necessarily preclude tolling. Tolling, by its very nature, becomes relevant because of seemingly inflexible time limits and thus arises in the context of language that, on its face, would appear to preclude it. *See* Part I.D *infra* (describing widespread application of tolling to strict statutory time limits).

[7] Regardless of any apparent clarity of the voluntary departure provision in isolation, consideration of the provision in the context of the statute and the 1996 amendments as a whole creates ambiguity. In *Costello*, the Court found ambiguity in the fact that the relation-back provision, though arguably clear on its face, did not specify how it would apply to the deportation provision at issue. 376 U.S. at 129. Likewise here, there is no indication how the voluntary departure provision should apply to the motion to reopen provision. *See also Witkovich*, 353 U.S. at 199-200 (refusing to read clause literally to confer upon the Attorney General unbridled discretion to require information from certain deportable aliens, and instead finding limitations on that discretion based on a reading of the clause in the context of the statute as a whole); *accord Shiver* v. *United States*, 159 U.S. 491, 494, 497 (1895) (rejecting a literal interpretation of a statute making it a crime to cut timber on "lands of the United States" because a second statute granting settlers "the privilege of residing on the land for five years" in order to perfect a homestead "would be ineffectual if [the settler] had not also the right to build himself a house, outbuildings, and fences, and to clear the land for cultivation").

administrative appeals. An administrative appeal "tolls the running of the time authorized by the Immigration Judge for voluntary departure." *Matter of A-M-*, 23 I. & N. Dec. 737, 743 (BIA 2005). In 2005, the BIA reexamined its longstanding practice of permitting such tolling[8] in light of Congress's addition of time periods to the voluntary departure scheme: The BIA concluded that "recent statutory and regulatory changes have not altered the basic [tolling] principle." *Id.*

Second, as in *Costello*, there is no indication that Congress even considered the tolling question at issue here.[9] As this Court has noted, such an absence is noteworthy in light of the "comprehensive character" of IIRIRA's legislative history. *See INS* v. *St. Cyr*, 533 U.S. 289, 320 n.44 (2001) (noting the significance of the fact that "despite [the legislative history's] comprehensive character, it contains no evidence that Congress specifically considered the question" at issue (citing *Harrison* v. *PPG Indus., Inc.*, 446 U.S. 578, 602 (1980) (Rehnquist, J., dissenting) ("In a case where the construction of legislative language such as this makes so sweeping and so relatively unorthodox a change as that made here, I think judges as well as detectives may take into consideration the fact that a watchdog did not bark in the night."))); *see also Costello*, 376 U.S. at 129 ("not a

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[8] *See Matter of Chouliaris*, 16 I. & N. Dec. 168, 170 (BIA 1977); *Matter of Villegas Aguirre*, 13 I. & N. Dec. 139, 140 (BIA 1969).

[9] For example, there is no mention of the interaction between voluntary departure and motions to reopen in the congressional reports on IIRIRA. *See* H.R. Conf. Rep. No. 104-828 (1996); H.R. Rep. No. 104-469, pt. 1 (1996); S. Rep. No. 104-249 (1996).

single indication in the copious legislative history" to suggest that Congress intended a particular result).[10]

Third, as in *Costello*, the Government's reading would "put [the alien] in a much more disadvantageous position than he would have occupied if he had never acquired [voluntary departure] at all." 376 U.S. at 131. In *Costello*, the Court focused on the fact that if Costello had been convicted of the crime while he was an alien (as opposed to when he was a citizen), he would have been able to apply for a type of discretionary relief. The Court rejected an interpretation that would have resulted in Costello's effectively losing this relief. *Id.* at 130-131. A similar disadvantage arises here. Absent tolling, a recipient of voluntary departure is placed in a much worse situation if his circumstances change and he seeks reopening. As the facts of this case demonstrate, the alien cannot withdraw his voluntary departure request, Pet. App. 3-4, and is then subject to additional penalties because he accepted voluntary departure, 8 U.S.C. § 1229c(d)(1).

Finally, this Court should resolve any remaining ambiguity in favor of Petitioner. 376 U.S. at 128. As in *Costello*, even if the matter were still in doubt, the Court would "nonetheless be constrained by accepted principles of statutory construction in this area of the

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[10] Congress's lack of consideration makes sense in the circumstances. Pre-IIRIRA, the harsh results of a no-tolling rule did not come to light. Before 1996, there were no limits on the time period for voluntary departure, *see generally* 8 U.S.C. § 1254(e) (1994) (repealed 1996); therefore, even without a tolling rule, aliens granted voluntary departure were not effectively deprived of the right to seek reopening (which at that time was only a creature of regulation). *Cf. Matter of Shaar*, 21 I. & N. Dec. 541, 546-548 (BIA 1996) (pre-IIRIRA decision concluding that motion to reopen did not toll voluntary departure period).

law to resolve that doubt in favor of the petitioner": "'[S]ince the stakes are considerable for the individual, we will not assume that Congress meant to trench on his freedom beyond that which is required by the narrowest of several possible meanings of the words used.'" *Id.* (quoting *Fong Haw Tan* v. *Phelan*, 333 U.S. 6, 10 (1948)); *see also St. Cyr*, 533 U.S. at 320 (invoking the "longstanding principle of construing any lingering ambiguities in deportation statutes in favor of the alien" (internal quotation marks omitted)).

2. This Court should not presume that Congress created a Hobson's choice or an arbitrary system

Under this Court's precedents, this Court should not presume that Congress created a Hobson's choice for aliens. A tolling rule ensures that voluntary departure recipients receive a decision on the merits of their motions to reopen. Under a no-tolling rule, however, an alien who files a timely motion to reopen during the voluntary departure period must either stay in the country awaiting a ruling on his motion to reopen and risking penalties for overstaying the deadline, or abide by the departure deadline, and forgo a decision on the motion. *See* 8 C.F.R. § 1003.2(d).[11]

In *Stone* v. *INS*, 514 U.S. 386 (1995), the Court adopted a construction that would avoid such a Hobson's choice. *Id.* at 398; *see also id.* at 399 ("This

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[11] This regulation has been the subject of litigation, though has been upheld in the Fifth Circuit. *Compare, e.g.*, *Navarro-Miranda* v. *Ashcroft*, 330 F.3d 672, 675-676 (5th Cir. 2003) (holding that regulation (previously designated at 8 C.F.R. § 3.2(d)) is enforceable), *with William* v. *Gonzales*, 499 F.3d 329, 334 (4th Cir. 2007) (holding that regulation is invalid) *and Reynoso-Cisneros* v. *Gonzales*, 491 F.3d 1001, 1002 (9th Cir. 2007) (limiting scope of regulation).

choice is one Congress might not have wished to impose on the alien."). The choice there was all the more difficult because "the consequences of deportation are so final, unlike orders in some other administrative contexts." *Id.* at 399. Here, as in *Stone*, this Court should not presume that Congress wanted aliens to face an untenable choice.[12]

This Court should also not presume that Congress intended to create an arbitrary system. The Government's interpretation would ascribe to Congress the intent to deprive a subset of voluntary departure recipients of the ability to benefit from a motion to reopen based on arbitrary government action or inaction. The statutory scheme, on its face, does not make it impossible for an alien to receive voluntary departure and also receive a decision on his motion to reopen. The sole determinant whether a voluntary departure recipient's motion to reopen will—or will not—be considered is how quickly the BIA happens to act. If the BIA acts quickly, then the motion will be considered; if not, it will not.

In fact, this is precisely what happens in practice. Some motions to reopen are decided quickly, in as few as 23 days.[13] However, notwithstanding the "dra-

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[12] *Stone* is discussed in more detail at n.26 *infra*.

[13] *See Matter of Bastos Borges*, 2007 WL 1192549 (BIA Mar. 30, 2007) (motion to reopen denied in 23 days); *see also, e.g.*, *Matter of Estrada-Campos*, 2007 WL 2463956 (BIA Aug. 3, 2007) (motion to reopen granted in 35 days); *Matter of Guerrero*, 2007 WL 2299599 (BIA July 23, 2007) (motion to reopen denied in 31 days); *Matter of Mendiola*, 2007 WL 2074492 (BIA June 11, 2007) (motion to reopen denied in 28 days); *Matter of Raja*, 2007 WL 1168550 (BIA Mar. 2, 2007) (motion to reopen granted in 25 days); *Matter of Madramuthu*, 2007 WL 1129362 (BIA Feb. 13, 2007) (motion to reopen granted in 26 days).

matic[]" "increase[] [in] disposition rate[s]," 67 Fed. Reg. at 54,899, many decisions on motions to reopen take longer.[14] And it is arbitrary government action alone that determines whether a particular voluntary departure recipient will fall within class A (such that he could have his motion to reopen adjudicated absent tolling) or class B (and be denied this right).

This Court should not presume that Congress intended this result. *See United States* v. *Wilson*, 503 U.S. 329, 334 (1992) (rejecting an "interpretation of the statute [that] would make the award of credit [for time served] arbitrary, a result not to be presumed lightly"); *see also Delgadillo* v. *Carmichael*, 332 U.S. 388, 391 (1947) (avoiding a construction that would make an alien's ability to remain in the United States turn on "fortuitous and capricious" circumstances).

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Thus, the Government's reading would effectively render an important statutory provision meaningless for an entire class of aliens. Under *Costello*, this interpretation should be rejected. In addition, a no-tolling rule would force aliens into a Hobson's choice and subject the viability of their claims to the arbitrary speed of agency decision-making: Congress should not be presumed to have intended either result.[15]

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[14] *See, e.g., Matter of Arriazola-Hernandez*, 2007 WL 2463984 (BIA July 31, 2007) (motion to reopen granted in just over four months); *Matter of Barragan-Toro*, 2007 WL 2074428 (BIA June 14, 2007) (motion to reopen granted in over six months).

[15] There can be no argument that *Chevron, U.S.A., Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), applies. The Government has conceded that the Department of Justice has not yet taken an official position on the tolling question presented. Opp. 14-15 & n.5. As the Government has noted, the

B. The Statutory Structure Does Not Require Voluntary Departure Recipients To Explicitly Or Implicitly Waive Their Motions To Reopen Or Other Administrative Appeals

The courts of appeals have suggested that voluntary departure is a form of settlement: the alien, in return for the right to manage his own departure, waives certain rights, including a motion to reopen. But that is not what the statute says. And there is no indication that Congress intended that a voluntary departure recipient be required to waive a motion to reopen as part of a *quid pro quo* for a grant of voluntary departure.

Congress could, of course, have crafted a scheme under which a voluntary departure recipient would be required to waive all appeals—administrative and judicial—in exchange for a grant of voluntary departure.

Department considered issuing regulations to address this question in 1997, but failed to do so. *Id.* n.5; *see also* 62 Fed. Reg. at 10,325-10,326. Nor has there been a precedential BIA decision on the issue following IIRIRA's amendments; and single-member, non-precedential orders of the BIA are not entitled to deference. *See* 8 C.F.R. 1003.1(e)(6)(ii); *see also, e.g., Rotimi* v. *Gonzales*, 473 F.3d 55, 57 (2d Cir. 2007) (per curiam) ("Because there is no indication that the BIA's nonprecedential single-member decision was 'promulgated' under its authority to 'make rules carrying the force of law,' we do not accord it *Chevron* deference" (quoting *United States* v. *Mead Corp.*, 533 U.S. 218, 226-227 (2001)). Thus, even assuming arguendo that *Chevron* would apply in this context, there is no relevant decision to defer to under *Chevron*.

While the Government has indicated that a regulation relating to the "reinstatement" of voluntary departure, 8 C.F.R. § 1240.26(h), speaks to the tolling question, Opp. 13-14, the Department of Justice plainly does not view the regulation as controlling. Indeed, the reinstatement provision was promulgated in 1997 as part of the same interim rule in which the Department posed the question whether a motion to reopen should toll the voluntary departure period. 62 Fed. Reg. at 10,325-10,326, 10,373.

But it did not. By its plain terms, the statute does not require any such waiver. *See Costello*, 376 U.S. at 132 (if Congress had wanted to waive statutory protections, it "could easily have said so"). By contrast, other provisions of the INA expressly require an alien to waive appeals. *See, e.g.*, 8 U.S.C. § 1187(b) (requiring "[w]aiver of rights" to appeal for aliens in visa waiver program);[16] *see also St. Cyr*, 533 U.S. at 318-319 (declining to infer congressional intent to apply a provision of IIRIRA retroactively where Congress was "willing[], in other sections of IIRIRA, to indicate unambiguously its intention to apply specific provisions retroactively").

The courts of appeals that have rejected tolling have misunderstood this critical fact: all three courts have erroneously suggested that an alien who accepts voluntary departure must waive certain rights.[17] While this is true as a matter of regulation for aliens who accept voluntary departure *before* the conclusion of proceedings, 8 C.F.R. § 1240.26(b)(1)(i)(D), it is false with

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[16] In 1996, Congress created a specific mechanism called "stipulated removal." 8 U.S.C. § 1229a(d) (added by IIRIRA, § 304(a)(3), 110 Stat. at 3009-593). Under this mechanism, such "[a] stipulated order shall constitute a conclusive determination of the alien's removability from the United States." *Id.*; *see also* 8 C.F.R. § 1003.25(b)(6). Tellingly, the voluntary departure provision does not refer to stipulated removal.

[17] *See Chedad*, 497 F.3d at 63 (stating that "voluntary departure [is] available only to aliens who agree to give up the fight and leave the country willingly"); *Banda-Ortiz*, 445 F.3d at 390 (suggesting that voluntary departure precludes an alien from "the chance of winning outright" (internal quotation marks omitted)); *Dekoladenu*, 459 F.3d at 506 ("A motion to reopen remains available to all aliens, but an alien who requests voluntary departure will forfeit his right to a decision on his motion to reopen if the IJ grants his request."); *id.* at 504 n.3 ("two types of voluntary departure implicate the same principles").

respect to aliens, such as Petitioner, who agree to voluntary departure at the conclusion of proceedings. *See id.* § 1240.26(c).[18] In the present case, for example, the immigration judge expressly asked whether Petitioner "reserve[d] appeal," and Petitioner's counsel confirmed that he did. C.A. App. 167.

Thus, under the statute and regulations, an alien granted voluntary departure at the end of proceedings: (1) is not required to waive administrative and judicial appeals; (2) has the right to file an appeal to the BIA (during which the voluntary departure period is tolled); and (3) has the right to judicial review of his final order of removal. Under the Government's view, then, the *only* right that the voluntary departure recipient waives by accepting voluntary departure is the right to a single motion to reopen—notwithstanding the fact that Congress *codified* the motion to reopen in 1996, and there is no indication whatsoever that Congress considered the issue. Congress could have required the waiver of a motion to reopen as a condition of voluntary departure, "but it makes no sense to suggest Congress did it under its breath." *Cook County, Ill.* v. *United States*, 538 U.S. 119, 133 (2003); *see also, e.g., Winkelman ex rel.*

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[18] The Board has noted that the purpose of voluntary departure in lieu of or before the conclusion of proceedings is "to quickly and efficiently dispose of numerous cases[.]" *Matter of Arguelles-Campos*, 22 I. & N. Dec. 811, 817 (BIA 1999); *see also* 62 Fed. Reg. at 10,325 (the agency "believes that voluntary departure authorized by immigration judges *prior to completion of proceedings* should be for the purpose of settling cases in the interests of economy and justice" (emphasis added)). The agency has not set forth the same rationale with respect to voluntary departure at the conclusion of proceedings. *See Arguelles-Campos*, 22 I. & N. Dec. at 817 (noting the "significant differences" between these two types of voluntary departure).

Winkelman v. *Parma City Sch. Dist.*, 127 S. Ct. 1994, 2002 (2007) ("[T]he Act does not *sub silentio* or by implication bar parents from seeking to vindicate the rights accorded to them once the time comes to file a civil action."); *Bates* v. *Dow Agrosciences LLC*, 544 U.S. 431, 449 (2005) ("If Congress had intended to deprive injured parties of a long available form of compensation, it surely would have expressed that intent more clearly.").

Moreover, in light of settled agency decisions in a related context, there is no reason to think that Congress would have required an implicit waiver of a motion to reopen as a condition of voluntary departure. It is well settled, for example, that for an alien to waive administrative appeals, the waiver must be a knowing one. *Matter of Patino*, 23 I. & N. Dec. 74, 76 (BIA 2001) (because of the "profound ramifications" of "relinquish[ing] the parties' opportunity to seek review of the Immigration Judge's ruling," any waiver must be "knowingly and intelligently made"); *Matter of Ocampo-Ugalde*, 22 I. & N. Dec. 1301, 1304 (BIA 2000) (holding that for those aliens who waive appeal rights by accepting voluntary departure (*i.e.*, those who accept voluntary departure before the conclusion of proceedings), the waiver must be a knowing one); *see also United States* v. *Mendoza-Lopez*, 481 U.S. 828, 840 (1987) (where immigration judge "permitted waivers of the right to appeal that were not the result of considered judgments" by the aliens, resulting in "waivers of their rights to appeal [that] were not considered or intelligent," Government may not rely on deportation order "as reliable proof of an element of a criminal offense").

The notion that Congress intended an implicit waiver is further undercut by the fact that Congress has required that voluntary departure recipients be given adequate notice of the penalties of overstaying a

departure period. *See* 8 U.S.C. § 1229c(d)(3). Given Congress's concern that aliens receive notice of the implications of voluntary departure, there is no reason to think that Congress intended to deprive aliens of this right without notice (or at all).[19]

Finally, it makes little sense to imagine that Congress intended to condition voluntary departure on an implicit waiver of the right to a motion to reopen, in light of the fact that *some* voluntary departure recipients will still be able to obtain adjudication of their motions. As discussed above, some voluntary departure recipients will have their motions to reopen considered, as in some cases the agency will act promptly and decide the motion within the voluntary departure period. *See* Part I.A.2 *supra*. Thus, for an implicit waiver of a motion to reopen, Congress would need to have intended waiver not by *all* voluntary departure recipients, but only by the subset whose motions would not be adjudicated during the voluntary departure period.

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[19] It is also incongruous to think that Congress intended voluntary departure recipients to forfeit their motions to reopen in light of its deliberate actions to preserve an alien's avenue to relief in the related context of judicial review. Specifically, before the 1996 amendments, the INA provided that no court had the authority to consider a petition for review if the alien left the country. *See* 8 U.S.C. § 1105a(c) (1994) ("An order of deportation or of exclusion shall not be reviewed by any court if the alien ... has departed from the United States after the issuance of the order."). The 1996 amendments made it easier for the agency to deport aliens pending judicial review, *see* 8 U.S.C. § 1252(b)(3)(B), (f)(2), but, importantly, repealed the provision that prevented an alien from petitioning for review from abroad, *see* 8 U.S.C. § 1105a(c) (1994), *repealed by* IIRIRA, § 306(b), 110 Stat. at 3009-612. Congress therefore ensured that aliens are able to receive a decision on the merits of their petitions for review from outside the country.

And, of course, the determination of which category a given alien would fall into would be based entirely on the arbitrary actions of the agency.[20]

C. The 1996 Amendments Indicate That Congress Did Not Intend To Privilege Criminal Aliens Over The Favored Class Of Aliens Eligible For Voluntary Departure

The Government's construction of the relevant statutory provisions should also be rejected because it turns congressional intent on its head, as it benefits criminal aliens over the favored aliens who are eligible for voluntary departure.

When Congress passed IIRIRA in 1996, one of its primary concerns was to enact reform with respect to aliens who had committed crimes. As this Court has stated, Congress acted against a "backdrop of wholesale failure by the INS to deal with increasing rates of criminal activity by aliens." *Demore* v. *Kim*, 538 U.S. 510, 518 (2003). In the months leading up to the passage of

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[20] The courts of appeals that have rejected tolling have made another error. Specifically, these courts have stated that one of the "main attractions" of voluntary departure is that aliens granted this relief do not face the same bars on readmission as aliens subject to a removal order. *Chedad*, 497 F.3d at 63 n.8; *Banda-Ortiz*, 445 F.3d at 389-390; *Dekoladenu*, 459 F.3d at 506. While it is true that voluntary departure recipients do not face the admissibility bar in 8 U.S.C. § 1182(a)(9)(A) (which renders an alien who has been ordered removed inadmissible for five or ten years), there is a distinct ten-year bar for aliens who are unlawfully present in the United States for more than one year; this bar is triggered by an alien's departure, *see id.* § 1182(a)(9)(B)(i)(II). As a result, a large number of aliens granted voluntary departure face the same bars on admissibility upon leaving voluntarily as under a removal order.

IIRIRA, Congress devoted extensive study to the problems posed by criminal aliens.[21]

Motivated by these concerns, Congress enacted numerous provisions stiffening the penalties for criminal aliens and restricting eligibility for relief. In IIRIRA, Congress both expanded the definition of those crimes for which aliens are deportable and made this definition retroactively applicable. *See* IIRIRA, § 321, 110 Stat. at 3009-627 (codified at 8 U.S.C. § 1101(a)(43)). Congress also provided for mandatory detention of criminal aliens. *Id.* § 305, 110 Stat. at 3009-598 (codified at 8 U.S.C. § 1226(c)). At the same time, Congress made criminal aliens ineligible for certain relief. *Id.* § 304, 110 Stat. at 3009-595 (codified at 8 U.S.C. § 1229b(a), (b)).

By contrast, voluntary departure is only available to a favored subset of aliens. Aliens who have committed aggravated felonies or terrorism offenses, for example, are barred by statute from receiving voluntary departure. 8 U.S.C. § 1229c(a)(1), (b)(1)(C). And, for those who obtain voluntary departure at the conclusion of removal proceedings (such as Petitioner), the statute requires that the alien demonstrate "good moral character" for the preceding five years. *Id.* § 1229c(b)(1)(B).

In addition, because voluntary departure is a form of discretionary relief, it is limited to an even more favored subset of aliens. The BIA has held that, in exercising discretion, immigration judges must balance a

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[21] *See* S. Rep. No. 104-48, at 1 (1995) ("America's immigration system is in disarray and criminal aliens ... constitute a particularly vexing part of the problem."); H.R. Rep. No. 104-22, at 6 (1995) ("The increasing public attention paid to our nation's immigration policies has brought to light the high number of aliens, both legal and illegal, who commit crimes while enjoying the benefits of this country.").

range of positive and negative factors, including whether the alien has any criminal record, has committed additional violations of immigration law, or has strong family ties to the United States. *Matter of Arguelles-Campos*, 22 I. & N. Dec. 811, 817 (BIA 1999).

Under the Government's reading of the statute, however, criminal aliens are privileged over voluntary departure recipients. Under the current regulatory framework, criminal aliens have a right to file a motion to reopen and, in many cases, will have those motions adjudicated. While such motions are deemed withdrawn once the alien is deported, 8 C.F.R. § 1003.2(d), criminal aliens may seek an administrative stay of their removal orders while their motions to reopen are pending. *See id.* §§ 1003.2(f), 241.6.[22] Moreover, it often takes time for the immigration authorities to enforce a removal order (and sometimes such orders are simply unenforced), which permits time for motions to be adjudicated.[23] By contrast, under a no-tolling rule, the favored subset of aliens who receive voluntary departure are effectively precluded from receiving an adjudication on their motions to reopen. Because the Government's construction is inconsistent with the statutory framework, it should be rejected. *See, e.g., Gonzaga Univ.* v. *Doe*, 536 U.S. 273, 290 (2002) (construing statute in light of other enactments by same Congress); *New York State Confer-*

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[22] On their face, these regulations do not appear to apply to the grant of voluntary departure. *See* pp. 36-37 *infra* (discussing difference between a grant of voluntary departure and a final order of removal).

[23] *See, e.g.*, DHS, *Performance Budget Overview* 8 (FY 2007), *available at* http://www.dhs.gov/xlibrary/assets/Budget_PBO_FY2007.pdf.

ence of Blue Cross & Blue Shield Plans v. *Travelers Ins. Co.*, 514 U.S. 645, 667 (1995) (same).

The Government's construction is particularly untenable in light of the fact that, when considering IIRIRA, Congress was especially concerned about criminal aliens abusing motions to reopen. Congress determined that criminal aliens often succeeded in "delay[ing] their deportations for years by taking advantage of an often-times irrational, lengthy and complex system of hearings and appeals." S. Rep. No. 104-48, at 2 (1995); *see also Criminal Aliens in the United States: Hearings Before the Permanent Subcomm. on Investigations of the S. Comm. on Governmental Affairs*, 103d Cong. 67 (1993) (Judge Fong Testimony).[24] While, in the end, Congress did not bar criminal aliens from seeking motions to reopen, it would be odd, to say the least, to interpret the statute to permit criminal aliens to file motions to reopen, but effectively bar those with good moral character from doing the same.

This Court has not hesitated to reject an interpretation that creates such "anomalies." In *Small* v. *United States*, 544 U.S. 385 (2005), for example, the Court considered whether the phrase "convicted in any court" included a conviction in a foreign court. While there was a fair argument that the plain language answered the question in the affirmative, *see id.* at 396-397 (Thomas, J., dissenting), the Court rejected that view. The Court considered the "anomalies" that would

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[24] Senator Spencer Abraham also raised this special concern, and suggested eliminating motions to reopen for criminal aliens. *See* 142 Cong. Rec. S4592, S4599 (May 2, 1996) (objecting to the fact that "criminal aliens will still be able to ... make a motion to reopen on the basis of changed circumstances ... [c]riminal aliens should be allowed only one bite at the apple").

arise if the statute were read to include foreign convictions, which would create "senseless distinction[s]" between covered domestic crimes and uncovered foreign crimes. *Id.* at 391-392. Such an interpretation was disfavored where there was no evidence that Congress considered the question. *Id.* at 390-391. Indeed, the Court rejected an interpretation that would lead to anomalous results notwithstanding the fact that it could be understood to advance the statute's purpose. *Id.* at 393;[25] *see also, e.g., Nixon* v. *Missouri Municipal League*, 541 U.S. 125, 137, 138 (2004) (concluding that in light of a "host of ... incongruities that would follow," it was "farfetched" to think Congress meant a particular result in the absence of a "clearer signal"). In the present case, tolling would avoid the perverse results that would otherwise follow from the Government's interpretation.

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[25] The Court's analysis in *Small* was based in part on the background rule that Congress generally intends its laws to have domestic, rather than extraterritorial, application. Yet, as the Court acknowledged, that background rule was not directly applicable. 544 U.S. at 389 ("[A]lthough the presumption against extraterritorial application does not apply directly to this case, we believe a similar assumption is appropriate" in construing the term at issue); *cf. id.* at 399 (Thomas, J., dissenting) (criticizing the majority for relying on an "entirely different, and well-recognized, canon against extraterritorial application of federal statutes," which the "majority rightly concedes ... does not apply directly to this case" (internal quotation marks omitted)). Even more powerfully, then, the "longstanding principle" of construing any lingering ambiguities in favor of the alien, *St. Cyr*, 533 U.S. at 320, supports a reading of the relevant provisions governing motions to reopen and voluntary departure that recognizes tolling.

D. In Other Contexts, This Court Has Concluded That A Motion To Reopen Or Reconsider Tolls An Otherwise Applicable Statutory Time Period

A holding that the voluntary departure period is tolled during the pendency of a timely motion to reopen also finds support in this Court's precedents addressing motions to reopen and to reconsider in a number of different but related contexts.

For over a century and a half, it has been the "traditional and virtually unquestioned practice" of this Court to find that a motion to reopen or to reconsider a tribunal's own decision automatically tolls the deadline for seeking further review elsewhere. *United States* v. *Healy*, 376 U.S. 75, 79 (1964). As early as 1844, in an opinion by Justice Story, this Court held that a motion to reopen a judgment of the court of appeals tolled the time for filing a further appeal. *Brockett* v. *Brockett*, 43 U.S. (2 How.) 238, 241 (1844). This tolling rule has been broadly applied to motions to reopen or reconsider (as well as motions for a new trial) in both civil and criminal cases, and before agencies, trial courts, and appellate courts. *See, e.g.*, *United States* v. *Ibarra*, 502 U.S. 1, 6-8 (1991) (per curiam); *Missouri* v. *Jenkins*, 495 U.S. 33, 45 (1990); *ICC* v. *Brotherhood of Locomotive Eng'rs*, 482 U.S. 270, 284 (1987); *United States* v. *Dieter*, 429 U.S. 6, 7-9 (1976) (per curiam); *Morse* v. *United States*, 270 U.S. 151, 153-154 (1926); *see also Stone*, 514 U.S. at 404 (referring to the "normal" tolling rule).[26]

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[26] The Government's suggestion (Opp. 11) that *Stone* controls here is misguided. In *Stone*, this Court held that Congress had crafted a limited exception to this general rule. 514 U.S. at 393, 397-398. As an initial matter, the Court recognized the general rule, *i.e.*, that motions to reopen or reconsider ordinarily render a

This Court has repeatedly permitted tolling notwithstanding strict statutory language that would seem to prohibit such a result. In *Ibarra*, for example, this Court held that a motion for reconsideration of a trial court's decision tolled the period for judicial review, despite the language in 18 U.S.C. § 3731, which provided that, "[a]n appeal by the United States [of a trial court's order suppressing or excluding evidence] ... *shall be taken within thirty days* after the decision, judgment or order has been rendered *and shall be diligently prosecuted.*" 502 U.S. at 3 n.1, 7 (emphasis added).[27] Likewise, in *Morse*, this Court stated that a timely motion for a new trial from a judgment of the Court of Claims tolled the time for appeal, notwithstanding statutory language directing that, "All appeals from the Court of Claims shall be taken within ninety days after the judgment is rendered[.]" 270 U.S. at 153.[28]

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final order nonfinal and toll the period for judicial review. *Id.* at 391-392 (discussing *Locomotive Eng'rs*). The Court focused on one statutory provision in particular, which provided for the consolidation of two kinds of petitions for judicial review (petitions for review of a deportation order and petitions for review of an agency reopening or reconsideration decision). *Id.* at 393-398; *see also* 8 U.S.C. § 1105a(a)(6) (1994) (repealed 1996) (current version at 8 U.S.C. § 1252(b)(6)). Because only a no-tolling rule would give rise to two separate petitions for review, the Court considered this consolidation provision as an "explicit exception" to the tolling rule in this "particular context." 514 U.S. at 397, 398.

[27] In *Ibarra*, the Court applied the tolling rule notwithstanding the fact that the motion for reconsideration was based on previously abandoned grounds: "[w]ithout a clear general rule litigants would be required to guess at their peril." 502 U.S. at 7.

[28] Indeed, this Court has explicitly acknowledged that there is no statutory authority for a tolling rule. *See, e.g., Dieter*, 429 U.S. at 8 n.3 (applying tolling notwithstanding "the lack of a statute or rule expressly authorizing [such tolling]").

In fact, this Court's own rules permit tolling notwithstanding a strict statutory deadline. The time period for filing a petition for certiorari is governed by statute, 28 U.S.C. § 2101(c), which provides that a writ of certiorari "shall be taken or applied for within ninety days after the entry of [the] judgment or decree." *See also* S. Ct. R. 13.1. This deadline is generally considered to be a jurisdictional one. *Id.* 13.2; *see also Bowles* v. *Russell*, 127 S. Ct. 2360, 2365 (2007) (certiorari deadline is jurisdictional); *Jenkins*, 495 U.S. at 45 & n.13. Notwithstanding the text of Section 2101(c), this Court's rules provide that a petition for rehearing in a court of appeals tolls the time for seeking review. *See* S. Ct. R. 13.3.

This precedent highlights that, in this different but related context, a motion to reopen or to reconsider can operate to suspend a statutory deadline. This present case, of course, does not involve a statutory period for seeking judicial review, but, rather, a period within which an alien is to depart the country voluntarily. This difference makes the present case a stronger candidate for tolling. First, unlike the final orders at issue in this Court's tolling precedents,[29] the voluntary departure order itself is not a final order of deportation. *See* 8 U.S.C. § 1101(a)(47) (defining "order of deportation"). Under the applicable regulations, an immigration judge who grants voluntary departure "shall also enter an *alternate* order o[f] removal," 8 C.F.R.

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[29] *See, e.g.*, *Dieter*, 429 U.S. at 8 (noting "the consistent practice in civil and criminal cases alike has been to treat timely petitions for rehearing as rendering the original judgment nonfinal for purposes of appeal for as long as the petition is pending"); *Healy*, 376 U.S. at 77-80 (petition for rehearing filed by the Government in a criminal case rendered the judgment nonfinal for purposes of appeal).

§ 1240.26(d) (emphasis added), and, provided that the alien abides by certain conditions, this alternate order remains administratively inactive throughout the voluntary departure period. *See, e.g.*, 8 C.F.R. § 1241.1(f). In other words, while this Court's precedents permit a *final* order to be rendered *nonfinal* by a motion to reopen, no such "undoing" is required here.

Second, this Court has permitted motions to reopen to toll *jurisdictional* deadlines, which are strictly construed. This Court has repeatedly emphasized that jurisdictional time limits are "mandatory" and cannot be altered by the Court "except as Congress permits." *Jenkins*, 495 U.S. at 45; *see also Bowles*, 127 S. Ct. at 2366. Nonetheless, the Court has held that a motion to reopen triggers automatic tolling even where the deadline involved is jurisdictional. *See, e.g., Jenkins*, 495 U.S. at 45 (petition for rehearing tolls the time for filing a petition for certiorari). A voluntary departure period presents an even stronger case for tolling because it does not implicate a jurisdictional bar.[30]

In fact, as noted, the BIA itself has long held that an administrative appeal tolls the voluntary departure period. *A-M-*, 23 I. & N. Dec. at 743 (timely filing of appeal "tolls the running of the time authorized by the Immigration Judge for voluntary departure"); *Matter*

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[30] The Court has relied on tolling in other contexts as well. In *Young* v. *United States*, 535 U.S. 43 (2002), for example, this Court applied equitable tolling to solve a statutory incongruity created by the interplay of several provisions of the Bankruptcy Code, which had created a statutory "loophole." *Id.* at 46, 47. While acknowledging that equitable tolling is typically limited to case-specific circumstances, this Court nonetheless held that such tolling was broadly applicable to the provision at issue, regardless of the particular facts of any individual case. *Id.* at 50-51.

of Chouliaris, 16 I. & N. Dec. 168, 170 (BIA 1977) (timely appeal tolls the running of the voluntary departure period); *Matter of Villegas Aguirre*, 13 I. & N. Dec. 139, 140 (BIA 1969) (same). While of course not controlling, the BIA's practice is especially significant because it tolls voluntary departure in circumstances virtually identical to this case—*i.e.*, while issues are pending before it—and notwithstanding the 60-day and 120-day time periods set forth by IIRIRA.

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Thus, statutory interpretation principles applied by this Court in a number of parallel contexts demand the conclusion that a timely motion to reopen automatically tolls a period of voluntary departure.

II. Constitutional Avoidance Strongly Favors An Interpretation That Permits Tolling

The doctrine of constitutional avoidance provides an additional rationale for adopting a tolling rule. The avoidance canon holds that where a statute is susceptible to more than one plausible construction, one of which raises "serious constitutional doubts," the reviewing court should adopt the interpretation that avoids these doubts. *Clark* v. *Martinez*, 543 U.S. 371, 380-382 (2005). It is clear that a plausible—indeed, superior—interpretation of the statute permits tolling of the voluntary departure period pending a motion to reopen. *See* Part I *supra*. A no-tolling rule, however, would raise serious constitutional doubts. Congress has provided aliens with the motion to reopen as one procedure in the scheme of procedures governing deportation. With Congress having done so, the Court should not presume that Congress intended for the arbitrary actions of immigration officials to deprive some aliens but not others of this procedure; this arbitrary treatment at the hands of government raises substan-

tial due process and equal protection concerns. In light of these concerns, the Court should permit tolling of the voluntary departure period pending a motion to reopen.

A. A No-Tolling Rule Would Raise "Serious Constitutional Doubts" Under The Due Process Clause

1. A no-tolling rule implicates liberty interests protected by the Due Process Clause

This Court has long recognized that an alien has a liberty interest, protected by the Due Process Clause, in remaining in this country, particularly where the alien has formed ties to the community. *See, e.g., Carlson* v. *Landon*, 342 U.S. 524, 537-538 (1942); *see also Yamataya* v. *Fisher*, 189 U.S. 86, 99-100 (1903); *Demore*, 538 U.S. at 523 ("'It is well established that the Fifth Amendment entitles aliens to due process of law in deportation proceedings.'" (quoting *Reno* v. *Flores*, 507 U.S. 292, 306 (1993))). Indeed, deportation "may result also in loss of both property and life, or all that makes life worth living." *Ng Fung Ho* v. *White*, 259 U.S. 276, 284 (1922). Accordingly, the Court has held that "[m]eticulous care must be exercised lest the procedure by which he is deprived of that liberty not meet the essential standards of fairness." *Bridges* v. *Wixon*, 326 U.S. 135, 154 (1945); *cf. Galvan* v. *Press*, 347 U.S. 522, 531 (1954) (holding that, despite its broad discretion over immigration matters, "the Government must respect the procedural safeguards of due process").

This liberty interest is protected by several procedures, under statutes and regulations, that guard against unlawful or erroneous deportation. *See, e.g., Bridges*, 326 U.S. at 154 ("We are dealing here with procedural requirements prescribed for the protection of the alien."); *see also, e.g.*, 8 U.S.C. § 1229a (setting forth procedural protections for removal proceedings).

The motion to reopen at issue in this case is one such procedure. Originally based in regulation, motions to reopen serve a critical purpose, offering a means to avoid deportation based on changed circumstances. *See* pp. 2-5 *supra*. Consistent with this important role, motions to reopen, which are available to all aliens, including voluntary departure recipients, are now an official part of the immigration code. *See* 8 U.S.C. § 1229a(c)(7).

Absent tolling, however, the availability of this procedure to voluntary departure recipients will depend entirely on arbitrary government action. If the BIA acts on the motion in time, before the expiration of the voluntary departure period, then the alien receives the procedural protection; if not, the alien is denied review by the BIA. And the speed with which the BIA acts may turn on any number of variables wholly unrelated to the alien and outside his control—vacation schedules, workloads, backlogs, and the work habits and whims of any given immigration official. BIA orders confirm significant variability in the timing of decisions on motions to reopen, some occurring swiftly enough to occur within a voluntary departure period, but many occurring too late. *Compare Matter of Bastos Borges*, 2007 WL 1192549 (BIA Mar. 30, 2007) (23 days), *with Matter of Barragan-Toro*, 2007 WL 2074428 (BIA June 14, 2007) (more than six months). *See also* Part I.A.2 *supra*.

"The touchstone of due process is protection of the individual against arbitrary action of government." *Wolff* v. *McDonnell*, 418 U.S. 539, 558 (1974) (quoting *Dent* v. *West Virginia*, 129 U.S. 114, 123 (1889)); *see also Demore*, 538 U.S. at 532 (Kennedy, J., concurring) ("[T]he Due Process Clause prohibits arbitrary deprivations of liberty."). Procedures are put in place to satisfy due process by guarding against such arbitrary depriva-

tions. *See, e.g., Vitek* v. *Jones*, 445 U.S. 480, 489 (1980) ("[D]ue process protections are necessary 'to insure that [a liberty interest] is not arbitrarily abrogated.'" (quoting *Wolff*, 418 U.S. at 557)). But to serve their protective purpose, the procedural protections must of course be available. And due process is violated where government action eliminates access to or otherwise bypasses such procedural protections in a given case. *See, e.g., Zadvydas* v. *Davis*, 533 U.S. 678, 718-724 (2001) (Kennedy, J., dissenting) (concluding that a "due process violation" would arise "[w]ere the INS, in an arbitrary or categorical manner, to deny an alien access to the administrative processes in place to review continued detention" because "aliens are entitled to be free from detention that is arbitrary or capricious.").[31]

This Court has gone further than this, requiring that the *procedures themselves* not be arbitrary, even in situations where the due process interest at stake is limited. *Ohio Adult Parole Authority* v. *Woodard*, 523 U.S. 272 (1998), considered a due process claim concerning the state clemency proceedings of a death row in-

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[31] The need for consistency in the availability of procedural protections is inherent in the concept of due process. In the particular context of immigration, the proposition that access to procedures protecting aliens' liberty interests cannot be arbitrarily eliminated finds support in the case law even in situations in which the procedure is a product of regulation, rather than statute. *See, e.g., Bridges*, 326 U.S. at 153 (holding that the alien could rely on BIA rules governing deportation procedures because "these rules are designed as safeguards against essentially unfair procedures"); *United States ex rel. Accardi* v. *Shaughnessy*, 347 U.S. 260 (1954) (holding that the alien was entitled to a discretionary decision by the BIA on his application for suspension of deportation, which was provided for by regulation, and that, in light of the regulations, such decision could not be formed based on pressure from the Attorney General).

mate. Having identified an ongoing interest in Woodard's life, five members of the Court held that, notwithstanding that the governor had complete discretion and the state could eliminate clemency altogether, this interest warranted "some *minimal* procedural safeguards" for clemency proceedings. *See id.* at 288-289 (O'Connor, J., concurring in part and concurring in the judgment, joined by Souter, Ginsburg, and Breyer, JJ.); *see also id.* at 292 (Stevens, J., concurring in part and dissenting in part). Because of the due process interest, "[j]udicial intervention might, for example, be warranted in the face of a scheme whereby a state official flipped a coin to determine whether to grant clemency, or in a case where the State arbitrarily denied a prisoner any access to its clemency process." *Id.* at 289 (O'Connor, J.).

Here, Petitioner is not seeking to regulate the discretion of the BIA in deciding the motion to reopen. Rather, he is making a more basic request that access to that discretion, which Congress has made available, not be arbitrarily eliminated by government action or inaction. Under a no-tolling rule, the chances that the BIA will review the motion on time are no more consistent or reliable than a coin flip. Given that Congress has made motions to reopen available, and even granted that the motions are resolved at the BIA's discretion, due process requires that the availability of such procedures not depend on arbitrary government action.

2. A no-tolling rule raises due process concerns over aliens' property interests in motions to reopen

The arbitrary elimination of the motion to reopen for a subset of aliens granted voluntary departure implicates property interests protected by the Due Process Clause. This Court has recognized property interests in

the right of access to adjudicative procedures, including those where the relief sought is not assured. And the Court has found that due process is violated where those property interests are arbitrarily eliminated by government action. Here, the no-tolling rule raises constitutional concerns by authorizing arbitrary deprivations of aliens' interests in the motion to reopen itself (as distinct from the underlying relief of reopening).

In *Logan* v. *Zimmerman Brush Co.*, 455 U.S. 422 (1982), the Court identified a property interest analogous to Petitioner's interest in the motion to reopen. Logan filed a timely charge of employment discrimination with a state commission but the claim was dismissed because, due to the commission's own inadvertence, it had failed to convene a fact-finding conference within the time period required by statute. *Id.* at 426-427.

Reversing, this Court held that Logan's "right to use the [state's] adjudicatory procedures" qualified as a "species of property protected by" the Due Process Clause. 455 U.S. at 428-429.[32] The Court observed that "'[w]hile the legislature may elect not to confer a property interest, ... it may not constitutionally authorize the deprivation of such an interest, once conferred, without appropriate procedural safeguards.'" *Id.* at 432 (quoting *Vitek*, 445 U.S. at 490-491 n.6). The state had deprived the plaintiff of the "opportunity to present his case and have its merits fairly judged." *Id.* at 433. "A system or procedure that deprives persons of their claims in a random manner ... necessarily presents an unjustifiably high risk that meritorious claims will be

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[32] The existence of such a property interest had been "affirmatively settled" in *Mullane* v. *Central Hanover Bank & Trust Co.*, 339 U.S. 306, 313 (1950). *Logan*, 455 U.S. at 428.

terminated." *Id.* at 434-435. In the instant case, as in *Logan*, a no-tolling rule means that "it is the state system itself that destroys a complainant's property interest, by operation of law, whenever the Commission fails to convene a timely conference" (or in this case, the BIA fails to resolve the motion), *id.* at 423, whether the "action is taken through negligence, maliciousness, or otherwise," *id.* at 436.[33]

The Court has been careful to distinguish such an interest from the interest in the relief sought, which itself may not be a protected interest. The discretionary nature of the relief, though relevant to any interest in the relief, need not affect the constitutional status of the interest in the procedure itself. *See, e.g., American Mfrs. Mut. Ins. Co.* v. *Sullivan*, 526 U.S. 40, 61 & n.13 (1999) (observing that plaintiffs "do not contend that they have a property interest in their claims for payment, as distinct from the payments themselves"); *see also id.* at 62 (Ginsburg, J., concurring in part and concurring in the judgment).[34]

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[33] Since *Logan*, the Court has observed that "[l]ittle doubt remains that such an intangible interest is property protected by the Fourteenth Amendment." *Tulsa Prof'l Collection Servs., Inc.*, v. *Pope*, 485 U.S. 478, 485 (1988) (claim against an estate for an unpaid bill).

[34] The case law demonstrates that the discretion involved in the grant of the motion to reopen does not eliminate the due process protections applicable to the motion itself. In *Logan*, the Court made clear that Logan was not entitled to relief, but merely "to have the Commission consider the merits of his charge." 455 U.S. at 434; *see also St. Cyr*, 533 U.S. at 307 (explaining that "[e]ligibility that was 'governed by specific statutory standards' provided 'a right to a ruling on an applicant's eligibility,' even though the actual granting of relief was 'not a matter of right un-

Here, Congress has made motions to reopen available to aliens, including those receiving voluntary departure. Consistent with *Logan*, the availability of the motion cannot be decided arbitrarily based on whether or not the BIA decides the motion in time. Such arbitrary treatment would create an "unjustifiably high risk that meritorious claims" for motions to reopen "will be terminated." *Logan*, 455 U.S. at 435; *see also Banda-Ortiz*, 445 F.3d at 393 (Smith, J., dissenting) (concluding that "it cannot accord with due process for the resolution of motions to turn on the happenstance of how quickly an agency can clear its docket").

Nor is it any answer to say that the arbitrary elimination of the motion is a feature of the motion as codified by Congress. In *Arnett* v. *Kennedy*, 416 U.S. 134 (1974), five Justices rejected this view. *See id.* at 166-167 (Powell, J., concurring in part and concurring in the result in part, joined by Blackmun, J.); *id.* at 177-178 (White, J., concurring in part and dissenting in part); *id.* at 210-211 (Marshall, J., dissenting, joined by Douglas and Brennan, JJ.). Justice Powell explained:

> This view misconceives the origin of the right to procedural due process. That right is conferred, not by legislative grace, but by constitutional guarantee. While the legislature may elect not to confer a property interest in federal employment, it may not constitutionally authorize the deprivation of such an interest, once conferred, without appropriate procedural safeguards.

Id. at 167; *cf. Vitek*, 445 U.S. at 490 n.6 (quoting Justice Powell's opinion in *Arnett* with approval). Here, once

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der any circumstances, but rather is in all cases a matter of grace'" (quoting *Jay* v. *Boyd*, 351 U.S. 345, 353-354 (1956))).

the agency and Congress have made motions to reopen available, the availability cannot be arbitrarily eliminated.

B. The Arbitrary Treatment Of Aliens Granted Voluntary Departure Under A No-Tolling Rule Raises Equal Protection Concerns

The disparate treatment of aliens granted voluntary departure based on arbitrary government actions raises an additional constitutional concern under the equal protection component of the Fifth Amendment.

Equal protection "imposes a requirement of some rationality in the nature of a class singled out." *James* v. *Strange*, 407 U.S. 128, 140 (1972) (quoting *Rinaldi* v. *Yeager*, 384 U.S. 305, 308-309 (1966)). Even where the Due Process Clause does not necessarily reach arbitrary deprivations of liberty or property, the principle of equal protection may restrain officials from engaging in differential treatment without rhyme or reason. *See, e.g.*, *Sandin* v. *Conner*, 515 U.S. 472, 487 n.11 (1995) (noting that even where due process does not apply, the Equal Protection Clause protects prisoners "from arbitrary state action even within the expected conditions of confinement"); *cf. City of Cuyahoga Falls* v. *Buckeye Cmty. Hope Found.*, 538 U.S. 188, 200 (2003) (Scalia, J., concurring) ("Those who claim 'arbitrary' deprivations of nonfundamental liberty interests must look to the Equal Protection Clause[.]").

Although the majority in *Logan* rested on due process, six Justices agreed that the treatment of Logan's claim failed the most basic requirements of the Equal Protection Clause. *See* 455 U.S. at 438-439 (Blackmun, J., separate opinion, joined by Brennan, Marshall, and O'Connor, JJ.); *id.* at 444 (Powell, J., concurring in the judgment, joined by Rehnquist, J.). As Justice Blackmun explained:

> certain randomly selected claims, because processed too slowly by the State, are irrevocably terminated without review. In other words, the State converts similarly situated claims into dissimilarly situated ones, and then uses this distinction as the basis for its classification. This, I believe, is the very essence of arbitrary state action.

Id. at 442 (Blackmun, J., separate opinion). Justice Powell agreed that the Illinois law had been applied in an "arbitrary and irrational" manner and therefore violated equal protection. *Id.* at 444 (Powell, J., concurring in the judgment).

Just as in *Logan*, the randomness of BIA timing converts similarly situated aliens granted voluntary departure into dissimilarly situated aliens for no reason.

C. The Constitutional Avoidance Canon Favors A Construction Of The Statute That Permits Tolling

Constitutional avoidance is "a tool for choosing between competing plausible interpretations of a statutory text, resting on the reasonable presumption that Congress did not intend the alternative which raises serious constitutional doubts." *Clark*, 543 U.S. at 381; *see Edward J. DeBartolo Corp.* v. *Florida Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988) ("[T]he elementary rule is that every reasonable construction must be resorted to, in order to save a statute from unconstitutionality." (internal quotation marks omitted)). Here, in light of the substantial constitutional concerns that would otherwise arise and the plausible construction of the statute to permit tolling, this Court should adopt this construction.

This Court has regularly relied upon the avoidance canon when interpreting immigration statutes. *See, e.g., St. Cyr*, 533 U.S. at 314 (adopting a limiting construction of IIRIRA to avoid constitutional doubts); *Zadvydas*, 533 U.S. at 699 (adopting a narrowing construction of 8 U.S.C. § 1231(a)(6) "to avoid a serious constitutional threat"); *Id.* at 689 ("We have read significant limitations into other immigration statutes in order to avoid their constitutional invalidation."); *see also Clark*, 543 U.S. at 384 (affirming *Zadvydas*); *Witkovich*, 353 U.S. at 201-202 (finding the "path of constitutional concern ... clear" in construing Section 242(d) of the INA of 1952). The application of the avoidance canon is far more straightforward here than in several prior cases.

A tolling rule, for instance, does not require this Court to ignore seemingly clear indicia of congressional intent in order to avoid constitutional problems—the statutory text is simply silent with respect to the problem at hand. *Compare* Part 1.A.2 *supra* (showing no indication that Congress intended to bar arbitrarily motions to reopen for voluntary departure recipients), *with St. Cyr*, 533 U.S. at 308-314 (finding a lack of clear and express congressional intent to bar the filing of habeas petitions in a statute entitled "Elimination of Custody Review by Habeas Corpus").

Moreover, tolling aliens' voluntary departure periods would not require this Court to cut a statutory limitation from whole cloth. Unlike the six-month limitation period adopted in *Zadvydas*, tolling is an ordinary judicial remedy, *see* Part 1.D *supra*. Indeed, Petitioner's reading of the statute is entirely consistent with the agency's practice of tolling voluntary departure periods pending appeals of immigration judges' decisions to the BIA, *see id.* (citing cases).

"[E]very reasonable construction must be resorted to[ ] in order to save a statute from unconstitutionality." *Gonzales* v. *Carhart*, 127 S. Ct. 1610, 1631 (2007) (internal quotation marks omitted). The tolling rule that Petitioner has urged constitutes a plausible interpretation of the Act. Given the "serious constitutional concerns" of the Government's construction, this Court should read the Act to require tolling of the voluntary departure period upon the filing of a timely motion to reopen.

III. At a Minimum, The Court Should Toll The Voluntary Departure Period In This Case

Even if this Court does not hold that tolling should be permitted for all timely motions to reopen, the Court should toll the voluntary departure period here.

At the time Petitioner filed his motion to reopen, he sought to withdraw his request for voluntary departure—*i.e.*, to waive any benefits and become subject to a final order of removal—but was not permitted to do so. Pet. App. 3-4; *see Young* v. *United States*, 535 U.S. 43, 44, 46-47 (2002) (applying equitable tolling to close statutory "loophole" in the Bankruptcy Code). And he sought a stay, which was never acted on by the agency. Pet. App. 3-4; *see also Sidikhouya*, 407 F.3d at 953-954 (Loken, C.J., dissenting in part and concurring in judgment) (rejecting broad tolling rule; nonetheless, because alien had filed for a stay with motion to reopen, concluding that court should remand to BIA for a ruling on alien's motion to stay).

Moreover, it simply cannot be said that Petitioner knowingly waived his right to a motion to reopen by accepting voluntary departure. *See, e.g.*, *Mendoza-Lopez*, 481 U.S. at 840; *Patino*, 23 I. & N. Dec. at 76 (because of the "profound ramifications" of "relinquish[ing] the parties' opportunity to seek review of the Immigration Judge's ruling," any waiver must be "knowingly

and intelligently made"); *cf.* 8 U.S.C. § 1229c(d)(3) (voluntary departure order shall inform alien of penalties for failure to depart). The immigration judge expressly asked whether Petitioner "reserve[d] appeal," and Petitioner's counsel responded that he did. C.A. App. 167.

In fact, at the time Petitioner filed his motion to reopen and reconsider, the courts of appeals to have considered the question had unanimously concluded that a timely-filed motion to reopen tolls the period of voluntary departure. *See* p. 10 *supra*; *see also Ibarra*, 502 U.S. at 7 ("[w]ithout a clear general rule litigants would be required to guess at their peril"); *Clymore* v. *United States*, 217 F.3d 370, 375-376 (5th Cir. 2000) (applying equitable tolling to a statute of limitations and citing the "unsettled state of the law at the time that [plaintiff] initiated his motion").

Thus, at a very minimum, tolling should apply in this case. In the alternative, Petitioner should be permitted to withdraw his request for voluntary departure and, instead, be subject to a final order of removal.

CONCLUSION

The judgment of the Fifth Circuit should be reversed.

Respectfully submitted.

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